

JAMES L. MICHAEL
Claimant

HAYDEN TOWER SERVICE, INC.
Respondent

TWIN CITY FIRE INSURANCE COMPANY
C/O SPECIALTY RISK SERVICES
 Insurance Carrier

ORDER

ISSUES

Respondent does not appear to dispute that claimant suffered personal injury to his foot as a result of a work-related accident on March 24, 2003, but disputes claimant also injured his elbows as a result of that accident. Respondent seeks review of whether claimant's bilateral elbow problems are causally related to the March 24, 2003 accident, whether claimant gave timely notice to respondent of that accident and whether the ALJ exceeded his jurisdiction in ordering respondent to pay temporary total disability compensation. Respondent argues that Judge Avery's Order for Compensation should be reversed and all benefits denied.

Conversely, claimant contends that the ALJ's Order for Compensation should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Respondent admits that on March 24, 2003, claimant was working in Nebraska for respondent when, "[a]s he was pulling a loaded pallet out of a truck, the pallet slipped off the tailgate causing Mr. Michael to fall back onto his elbows. The pallet fell on his right foot and crushed his small toes. Claimant called Chad Jepson, the human resources coordinator for Hayden Tower, on the day of the accident. He informed him of the foot injury only."¹ Respondent's argument is that claimant's notice of accident was deficient because he only mentioned injuring his toes. Respondent contends that claimant's failure to notify respondent that he also suffered injury to his elbows within ten (10) days of the accident, precludes him from receiving workers compensation benefits for those injuries. The Appeals Board (Board) disagrees. K.S.A.44-520 requires claimant to report an accident within ten (10) days, it does not require a claimant to itemize each and every body part that may have been injured. Claimant's failure to mention his elbows may be relevant to the issue of causation, but it does not render his notice ineffective nor untimely.

Claimant testified at the preliminary hearing that in addition to his toes, he also injured his elbows in the March 24, 2003 accident. Claimant did not seek medical attention for his right foot and elbow injuries for approximately a month. He first sought medical treatment with his family physician, Michael Atwood, M.D., who in turn referred him to Wade B. Welch, M.D., a neurologist. Claimant saw Dr. Welch on May 28, 2003 and reported injuring his foot and elbows in the work-related accident. Dr. Welch referred claimant to J. Douglas Cusick, M.D., for treatment. Dr. Cusick performed surgery on claimant's left elbow on May 12, 2004, and his right elbow on August 4, 2004. The Board finds from the record as it currently exists that claimant's elbow problems are the result of injuries arising out of and in the course of his employment with respondent.

Claimant last worked for respondent on April 17, 2003, when he resigned to work for another company. Claimant contends that the ALJ exceeded his jurisdiction in awarding claimant temporary total disability compensation because the evidence indicates that respondent could have accommodated claimant's restrictions and would have done so had he not previously voluntarily left his employment with respondent to take a job with another employer. However, whether claimant is temporarily and totally disabled and whether temporary total disability compensation should be ordered paid are not issues that are reviewable from a preliminary hearing order.

The Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board can review only allegations that an ALJ exceeded his or her jurisdiction.² This includes review of the preliminary hearing issues

¹ Brief of Respondent and Insurance Carrier at 3 (filed Oct. 25, 2004).

² K.S.A. 44-551.

listed in K.S.A. 44-534a(a)(2) as jurisdictional issues, which are (1) whether the worker sustained an accidental injury, (2) whether the injury arose out of and in the course of employment (3) whether the worker provided timely notice and timely written claim, and (4) whether certain other defenses apply. The term "certain defenses" refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.³

The issue of whether a worker satisfies the definition of being temporarily and totally disabled is not a jurisdictional issue listed in K.S.A. 44-534a(a)(2). Additionally, the issue whether a worker meets the definition of being temporarily and totally disabled is a question of law and fact over which an ALJ has the jurisdiction to determine at a preliminary hearing.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test for jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.⁴

The ALJ has the jurisdiction and authority to grant or deny temporary total disability benefits at a preliminary hearing. Therefore, the ALJ did not exceed his jurisdiction.

Accordingly, the Board concludes that it does not have jurisdiction at this juncture of the proceedings to review whether the ALJ erred in granting claimant temporary total disability compensation.

As provided by the Workers Compensation Act, preliminary hearing findings are not final but subject to modification upon full hearing on the claim.⁵ Furthermore, there is no limit to the number of preliminary hearings that may be held in a case. Respondent is free to seek another hearing and present such additional evidence as it deems relevant.

WHEREFORE, the September 17, 2004 Order for Compensation entered by Administrative Law Judge Brad E. Avery is affirmed.

IT IS SO ORDERED.

³ *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

⁴ *Allen v. Craig*, 1 Kan. App. 2d 301, 303 and 304, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

⁵ K.S.A. 44-534a(a)(2).

Dated this ____ day of February 2005.

BOARD MEMBER

c: John M. Ostrowski, Attorney for Claimant
D'Ambra M. Howard, Attorney for Respondent and Twin City Fire Ins. Co.
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director